

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

DOROTHEA C. BURGE
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-369
Case No. 77-2665

S.S.A. No.

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. LA-8549

The claimant appealed from the decision of the Administrative Law Judge which held that the claimant was eligible for reduced benefits only for the week ending December 4, 1976 under section 1253.5 of the Unemployment Insurance Code; that the claimant was disqualified for benefits for five weeks under section 1257(a) of the code as provided in section 1260(d) of the code; and that the claimant had been overpaid benefits in the amount of \$59 for which she was liable under section 1375 of the code.

STATEMENT OF FACTS

The claimant's regular and customary work is sedentary as a bench assembler of electrical components. When she became unemployed in September 1976, she began claiming and receiving unemployment insurance benefits at the rate of \$104 a week in connection with a previously established benefit year effective May 2, 1976.

While the claimant was in her home on Wednesday morning, December 1, 1976, she dropped a table on her left foot. About an hour later, the claimant drove her car to the plant of a former employer in order to inquire about work, but no hiring was being done that day. The claimant had no difficulty driving because her car had an automatic gear shift and she used her right foot to drive. Later in the day, the claimant's left foot started to swell. She consulted a doctor, had an x-ray, and was advised that a bone was broken in her left foot. The claimant was provided

with a special type of shoe, in lieu of a cast, and told to return in three weeks. The claimant and the doctor discussed whether a claim for disability benefits should be filed and he said he would put the claimant on disability beginning the day of the injury if she wished.

On Thursday, December 2, 1976, the claimant drove her car to inquire, without success, about work with another employer. On December 2, she also completed the claimant's portion of the standard first claim form for disability benefits, on which she certified that December 1, 1976 was the first day on which she was disabled and unable to perform her regular and customary work. The claimant mailed the form to the doctor who also certified that the disability began December 1, 1976 and he gave a prognosis date of January 24, 1977. The claimant mailed the completed form to the Department on or about December 6, 1976.

On Wednesday, December 8, the claimant came in person to the Torrance office of the Department to file her continued claim statement for the weeks ending November 27 and December 4, 1976. She answered "Yes" for both weeks in reply to the question: "Were you physically able to work full time each day of that week?" She answered "No" to the question: "Was there any other reason you couldn't have worked full time each regular workday that week?" However, her answer to the latter question for the week ending December 4, 1976 appears to have been "yes" originally, but then erased and "no" substituted. When questioned about the matter later, the claimant offered no explanation. The claimant received her regular benefits of \$104 for each of the two weeks in question. Thereafter she claimed disability benefits.

The claimant's disability claim was established effective December 1, 1976 with disability benefits payable at the rate of \$119 a week. When the Department discovered that the claimant had been paid unemployment benefits for a portion of the period for which the claimant had also filed a disability claim, that is, the four-day period beginning December 1, 1976 through December 4, 1976, the Department determined that the claimant was eligible for reduced unemployment benefits only for the first three days of the week ending December 4, 1976 and that the claimant had been overpaid unemployment benefits in the amount of \$59 for which she was liable, which overpayment was then offset against disability benefits otherwise due to the claimant. The Department also determined that the claimant had willfully made a false statement of material facts to obtain unemployment benefits and was disqualified for such benefits for a five-week period.

The evidence in the record before us shows that the claimant has made conflicting statements and taken inconsistent positions before and during the hearing as to why she filed overlapping claims and as to whether she was or was not disabled on December 1, 2, 3, and 4, 1976. The Administrative Law Judge found that the claimant was not able to work those four days. In connection with this appeal the claimant has offered medical evidence in support of her present position that she was in fact able to work those four days. Such offer of proof has been rejected for the reason that there has been no showing why, in the exercise of reasonable diligence, that evidence could not have been offered at the hearing before the Administrative Law Judge.

The questions before us for consideration are:

- (1) Was the claimant unable to work for four days and eligible for reduced benefits only for the week ending December 4, 1976;
- (2) Did the claimant wilfully make a false statement or representation or wilfully fail to report a material fact to obtain any unemployment benefits; and
- (3) Was the claimant overpaid benefits in the amount of \$59 for which she was liable?

REASONS FOR DECISION

Section 1253(c) of the Unemployment Insurance Code provides as follows:

"An unemployed individual is eligible to receive unemployment compensation benefits with respect to any week only if the director finds that:

* * *

"(c) He was able to work and available for work for that week."

Section 1253.5 of the code provides as follows:

"Notwithstanding the provisions of subdivision (c) of Section 1253, if an individual is,

in all other respects, eligible for benefits under this part, and such individual becomes unable to work due to a physical or mental illness or injury for one or more days during such week, he shall be paid unemployment compensation benefits at the rate of one-seventh the weekly benefit amount payable for that week for each day which he is available for work and able to work. The amount of benefits payable, if not a multiple of one dollar (\$1), shall be computed to the next higher multiple of one dollar (\$1). The individual shall not be entitled to unemployment compensation benefits for any day during such week which he is unable to work due to such physical or mental illness or injury."

Because of the nature of the injury to the claimant and the sedentary nature of the claimant's regular and customary work, it is not a simple, easy matter to ascertain the day upon which the claimant first became unable to work. The claimant sought work after she injured her left foot both before and after she saw a doctor and was advised that a bone was broken. The claimant was able to drive her car using her right foot. The work applied for was sedentary.

Nevertheless, the claimant did consult a doctor because of the injury and the swelling on December 1, 1976. The claimant was given a special shoe to wear. She and the doctor discussed whether a claim for disability benefits should be filed for a period beginning that day. The claimant in fact filed such a claim, on which both she and the doctor certified to the beginning date of December 1, 1976. While the claimant thereafter made conflicting statements and took inconsistent positions as to whether she was or was not disabled beginning that date, the Administrative Law Judge found that the claimant was not able to work on December 1, 2, 3, and 4, 1976. The claimant belatedly has attempted to present further evidence in connection with this appeal. However, we may consider only that evidence which is properly in the record before us and we so limit ourselves here.

On evaluating cases of such conflicting and contradictory evidence, we give full weight to the consideration that the Administrative Law Judge has observed the witnesses, their demeanor, and their manner of testifying, and may have properly taken these into consideration in reaching his findings. Therefore, unless his findings are manifestly against the weight of the evidence properly in the record before us, we will not disturb his findings (Appeals Board Decision No. P-B-10).

Therefore, we conclude in the present case that the claimant was not able to work on December 1, 2, 3, and 4, 1976 as found by the Administrative Law Judge. It follows that the claimant was eligible for reduced benefits only for the week ending December 4, 1976 under section 1253.5 of the code. Accordingly, she was entitled to unemployment benefits for only three days that week, or a total of \$45, leaving an overpayment of \$59.

Section 1257(a) of the code provides as follows:

"An individual is also disqualified for unemployment compensation benefits if:

"(a) He wilfully made a false statement or representation or wilfully failed to report a material fact to obtain any unemployment compensation benefits under this division."

As pointed out by the California Court of Appeal in Diagnostic Data, Inc. v. California Unemployment Insurance Appeals Board (1973), 34 Cal. App. 3d 556, 110 Cal. Rptr. 157, section 1257(a) of the code does not require any "intent to deceive." It is sufficient that material facts are falsely represented to or withheld from the Department.

In the present case the claimant filed a claim for disability benefits and a claim for unemployment benefits for the same four-day period. Both forms of benefits are part of a comprehensive, integrated program of social insurance which, together with workers' compensation, are designed to alleviate the burden of a loss of wages by a particular employee during a particular period of time. They are interrelated by the common principle of permitting only a single recovery of benefits at one time (California Compensation Insurance Company v. Industrial Accident Commission (1954), 128 Cal. App. 2d 797, 276 P. 2d 148). Section 2628 of the code provides that an individual is not eligible for disability benefits for any period for which he has received or is entitled to receive unemployment benefits. The code does not contain any similar provision that an individual is not eligible for unemployment benefits because of the prior receipt of disability benefits for the same period. Instead, the code requires that an individual be able to work all or some of a week in order to be eligible for unemployment benefits under sections 1253(c) and 1253.5 of the code.

That an individual should not claim unemployment benefits as able to work and at the same time claim disability benefits as unable to work for the same days seems elementary. Where, as here, there may exist some real question as to which type of claim should be filed, all of the material facts should be presented to the Department in order that the proper claim or claims to the claimant's best advantage may be filed. Here, the claimant's unemployment benefits were at the rate of \$104 a week, or less than \$15 a day, while her disability benefits were at the weekly rate of \$119, or \$17 a day, payable of course after the waiting period week required under section 2627(b) of the code (Appeals Board Decision No. P-D-12). To the extent warranted under the facts, it was to the claimant's advantage to have her disability claim commence as soon as possible, that is on December 1, 1976, in order to start serving her waiting period week and then commence receiving benefits at the disability rate of \$119 a week instead of the unemployment rate of \$104 a week. Instead of presenting all of the facts to the Department when filing her claim for unemployment benefits, the claimant withheld information that she had had an injury for which she had received medical care and in connection with which she had filed a claim for disability benefits. No mere error in dates furnishes sufficient explanation for withholding such information.

Accordingly, after careful review of all of the circumstances, we have concluded, as did the Department and the Administrative Law Judge, that the claimant wilfully withheld material facts and wilfully made a false statement or representation to obtain unemployment benefits under the provisions of section 1257(a) of the code. We further hold, however, considering all of the circumstances, including the facts that only four days were involved and that the claimant continued her search for work after the injury, that only the minimum period of disqualification of two weeks set forth in section 1260(d) of the code is appropriate in this case.

Section 1375 of the code provides as follows:

"Any person who is overpaid any amount as benefits under this part is liable for the amount overpaid unless:

"(a) The overpayment was not due to fraud, misrepresentation or wilful nondisclosure on the part of the recipient, and

"(b) The overpayment was received without fault on the part of the recipient, and its recovery would be against equity and good conscience."

In this case, the claimant was overpaid unemployment benefits in the amount of \$59 based upon the finding that she was disabled and unable to work for four days of the week ending December 4, 1976. This overpayment arose out of the misrepresentation or wilful nondisclosure on the part of the claimant. Therefore, under the express language of the statute, it cannot be waived and the offset of that overpayment against the disability benefits to which the claimant was otherwise entitled was authorized under section 1379 of the code.

DECISION

The decision of the Administrative Law Judge is modified. The claimant was eligible for reduced benefits only for the week ending December 4, 1976 under section 1253.5 of the code. The claimant is disqualified for benefits for a two-week period only under section 1257(a) of the code as provided in section 1260(d) of the code. The claimant was overpaid unemployment benefits in the amount of \$59 for which she was liable under section 1375 of the code, which overpayment has been fully offset against the claimant's disability claim as provided in section 1379 of the code.

Sacramento, California, October 25, 1977.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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